No. 25-332

IN THE
Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,
Petitioners,

v.

REBECCA KELLY SLAUGHTER, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

BRIEF OF GWYNNE WILCOX AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTRODUCTION AND INTEREST OF AMICUS CURIAE[1]

Like Petitioner Rebecca Slaughter, amicus curiae Gwynne Wilcox was removed by the President in violation of a statutory for-cause removal limit—in her case, a provision protecting members of the National Labor Relations Board. Although the constitutionality of the NLRB's removal limit is not directly at issue in this case, the government has taken the far-reaching position that *any* restriction on the President's removal power is unconstitutional. If accepted by this Court, the government's position would end agency independence in the United States—from the Nuclear Regulatory Commission to the Court of Appeals for Veterans Claims—with potentially catastrophic consequences to the structure of the federal government. Indeed, it is "hard to imagine a precedent whose overruling could more radically upend existing institutions." Daniel B. Rice & Jack Boeglin, *Confining Cases to Their Facts*, 105 Va. L. Rev. 865, 917 (2019).

Ms. Wilcox submits this brief to urge the Court to take a more modest approach. For the reasons set forth in Ms. Slaughter's brief, this Court should reject the government's far-reaching argument and uphold the constitutionality of the FTC's removal limits as falling squarely within the nation's long tradition of independent agencies. Whatever it decides as to the FTC, however, the Court should take care to avoid broad pronouncements that could be read to decide the constitutionality of

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[1] No counsel for a party authored the brief in whole or in part, and no person or entity, other than the amicus curiae and her counsel, made a monetary contribution to the preparation or submission of the brief.

removal limits applicable to the dozens of other independent federal agencies—including the NLRB—that Congress has created in reliance on this Court's longstanding precedent but that are not at issue here. Congress created each independent agency with unique features that may control the constitutional analysis. There can thus be no one-size-fits-all answer to whether an agency's removal limit satisfies the Constitution: This Court has upheld for-cause removal limits on a range of "traditional independent agencies headed by multi-member boards or commissions," while striking down similar limits on "novel" single-member agencies that lack "a foundation in historical practice." *Seila Law LLC v. CFPB*, 591 U.S. 197, 197, 204, 220 (2020).

With the NLRB, in particular, Congress imposed a "separation of powers within the agency." *NLRB v. United Food & Com. Workers Union, Loc. 23, AFL-CIO*, 484 U.S. 112, 118 n.5 (1987). That structure expressly reserves prosecutorial functions to the General Counsel, who serves at the pleasure of the President and is "independent of the Board's supervision." *Id.* at 117–18 & n.5; *see* 29 U.S.C. § 153(d). By contrast, the agency's five-member Board—of which Ms. Wilcox was a member—is structured like a court in both form and function, with members acting as a panel of appellate judges, issuing mostly unanimous decisions by applying federal labor law to the record in the cases that come before it. *See* 29 U.S.C. § 160. Like the War Claims Commission in *Wiener v. United States*, the Board is an independent "adjudicatory body" performing "intrinsic judicial" functions. 357 U.S. 349, 355–56 (1958). And just as life tenure allows Article III judges to decide cases free from political pressure or the threat of removal for unpopular decisions, the Board's removal protections ensure its legitimacy as a neutral

arbiter of labor disputes. As this Court has recognized, an adjudicative body can't be expected to fairly apply law to facts with "the Damocles' sword of removal" hanging over its head. *Id.* at 355–56.

The Board also differs from the FTC in other significant ways: It has tightly limited rulemaking powers, no authority to initiate prosecutions, cannot impose penalties beyond restoring the status quo, and—as Judge Oldham has observed—"may be the only agency that needs [an Article III] court's imprimatur to render its orders enforceable." *Dish Network Corp. v. NLRB*, 953 F.3d 370, 375 n.2 (5th Cir. 2020). No court of appeals has yet addressed these agency-specific features on the merits. Nor has any court addressed whether—even assuming some aspect of the NLRB's structure or authority raises separation-of-powers concerns—the proper remedy would be to sever any problematic provisions rather than compromising the independence of neutral adjudicators.

There is no need for this Court to rush to judgment on the constitutional impact of these provisions in a case where the provisions are neither at issue nor the subject of briefing by the parties. *See Moyle v. United States*, 603 U.S. 324, 336–37 (2024) (Barrett, J., concurring) (cautioning against "jump[ing] ahead of the lower courts, particularly on an issue of such importance"). For ninety years, the Court has allowed the NLRB's removal limit to stand. And for ninety years the limit has stood unchallenged by fourteen presidential administrations. No real-world harm will come from allowing the D.C. Circuit to complete its review of these provisions before this Court wades into the question of their constitutionality. Indeed, this Court already held—in

denying the government's request for certiorari before judgment in Ms. Wilcox's case—that the "question is better left for resolution after full briefing and argument." *Trump v. Wilcox*, 145 S. Ct. 1415, 1415 (2025). Nothing has changed to alter that conclusion.

STATEMENT

A. Statutory background

1. Congress created the NLRB as an independent, multimember adjudicative body.

Congress established the National Labor Relations Board "in response to a long and violent struggle for workers' rights." *Wilcox v. Trump*, 775 F. Supp. 3d 215, 220 (D.D.C. 2025).[2] "In the latter part of the nineteenth century and the early decades of the [twentieth] century, the American labor scene was often a sordid spectacle of violence, rioting, demonstrations, and sit-ins." Arnold Ordman, *Fifty Years of the NLRA: An Overview*, 88 W. Va. L. Rev. 15, 15–16 (1985). "The use of armed guards, police, and the military was an all too familiar phenomenon." *Id.* For "the promotion of industrial peace," *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 257 (1939), Congress created the NLRB as an independent and impartial adjudicative body shielded from political pressures to serve "in the public interest." *Amalgamated Util. Workers v. Consol. Edison Co. of N.Y.*, 309 U.S. 261, 265 (1940). Congress gave the NLRB exclusive jurisdiction to adjudicate labor disputes that arise under the National Labor Relations Act to protect employers,

[2] Unless otherwise noted, all internal quotation marks, citations, alterations, brackets, and ellipses have been omitted from quotations throughout this brief.

employees, and the general public from unfair labor practices that impede commerce. *See* 29 U.S.C. §§ 157–60.

The NLRB "is a paradigmatic example of a multimember group of experts who lead an independent federal office." *Wilcox*, 775 F. Supp. 3d at 223. Congress determined that the independence of Board members was critical to protect them "from being subject to immediate political reactions at elections." NLRB, 1 *Legislative History of the National Labor Relations Act*, at 1467 (1949). The NLRA's sponsor, Senator Robert Wagner, explained that disputes between employers and employees should be adjudicated by an autonomous tribunal "detached from any particular administration that happens to be in power." *Id.* at 1428.

Reflecting that congressional judgment, "the Board was designed to be an independent panel of experts that could impartially adjudicate disputes." *Wilcox*, 775 F. Supp. 3d at 221; *see* 29 U.S.C. § 153(a). Congress imbued the Board with the hallmarks of an independent agency, including statutory removal protection, specified tenure, a multimember structure, and adjudication authority. *See* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 Cornell L. Rev. 769, 825 (2013).[3] President Franklin D.

[3] Unlike some independent agencies, the NLRB does not have a mandatory bipartisanship requirement. But because the President names the Chair, and because the Board's members serve staggered terms, every president has the "opportunity to shape its leadership and thereby influence its activities." *Seila Law*, 591 U.S. at 206. The agency also has a long history and tradition of bipartisanship. The "NLRB has consistently held a 3-2 breakdown in membership: three Board members from the president's party and two Board members from the opposing party." Emma Barudi, *An Assumed Tradition: How the 3-2 Balance of the NLRB Is More Than the Sum of Its*

Roosevelt signed the Act into law, lauding the creation of "an independent quasi-judicial body." Franklin D. Roosevelt, President of the United States, *Statement on Signing the National Labor Relations Act* (July 5, 1935); *see also* NLRB, *First Annual Report of the National Labor Relations Board* at 9 n.1 (1936).

As originally enacted in 1935, the NLRA "granted the Board plenary authority over all aspects of unfair labor practice disputes: The Board controlled not only the filing of complaints, but their prosecution and adjudication." *United Food & Com. Workers*, 484 U.S. at 117. Congress, however, changed that structure in the Labor Management Relations Act of 1947 (also known as the Taft-Hartley Act), dividing the Board's "prosecutorial and adjudicatory functions between two entities." *Id.* at 117–18 & n.5. Congress "determine[d] that the General Counsel of the Board should be independent of the Board's supervision and review." *Id.* The Act thus imposed a form of "separation of powers within the agency," dividing the agency's prosecutorial functions from its adjudicative ones. *Id.* at 118 n.5 (citing legislative history).

As a result, the NLRB today is a "bifurcated agency." *Wilcox*, 775 F. Supp. 3d at 220. "The two sides operate independently," with the General Counsel "independent of the Board's control." *Id.*; *see United Food & Com. Workers*, 484 U.S. at 117–18. On one side of the split are the General Counsel and several Regional Directors, who are charged with prosecuting unfair labor practices and enforcing labor law. *United Food & Com. Workers*, 484

Appointments and an Argument for Its Continuation, 26 N.Y.U. J. Legis. & Pub. Pol'y 817, 819 (2023).

U.S. at 117–18; *see* 29 U.S.C. § 153(d). The General Counsel is appointed by the President, removable at will, and "independent of the Board's" control. *United Food & Com. Workers*, 484 U.S. at 118. The General Counsel is the "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints … and in respect of the prosecution of [] complaints before the Board." 29 U.S.C. § 153(d). This Court has held that the General Counsel has "unreviewable discretion to refuse to institute an unfair labor practice complaint," *Vaca v. Sipes*, 386 U.S. 171, 182 (1967), as well as exclusive authority to dismiss or informally settle charges, *United Food & Com. Workers*, 484 U.S. at 119–21.

Unlike many other agencies, the NLRB lacks authority to initiate investigatory or enforcement actions on its own. *See Chamber of Com. of U.S. v. NLRB*, 721 F.3d 152, 156 (4th Cir. 2013). "Until a charge is brought, the Board may take no enforcement action." *United Food & Com. Workers*, 484 U.S. at 118–19. Rather, the agency—like a court—may employ "its statutory powers only if and when its processes are invoked by the private parties who invoke those processes." Ordman, *Fifty Years of the NLRA*, 88 W. Va. L. Rev. at 18.

On the other side of the split, Congress created an independent, quasi-judicial Board charged with adjudicating labor disputes under the NLRA. *Wilcox*, 775 F. Supp. 3d at 221. Like many other multimember entities, the Board was designed to be an independent panel of experts that could impartially adjudicate disputes. *See* Datla & Revesz, *Deconstructing Independent Agencies*, 98 Cornell L. Rev. at 770–71 (describing the NLRB as a classic example of an agency designed to be independent). The Board is "judicial in character." *Chamber of Com.*, 721

F.3d at 155 & n. 1. It consists of five members appointed by the President "with the advice and consent of the Senate" for staggered five-year terms. 29 U.S.C. § 153(a). One member, designated by the President, serves as the Board's Chair. *See id.*

The Board (unlike the General Counsel) is protected from at-will removal by the President, who is authorized to remove a Board member "upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause." *Id.* Its powers are carefully circumscribed. Relief ordered by the Board is not independently enforceable; the Board must seek enforcement in a federal court of appeals. 29 U.S.C. §§ 154, 160(e). Compliance with an order of the Board is not obligatory until entered as a decree by a court. *See In re NLRB*, 304 U.S. 486, 495 (1938). And the Board is limited to ordering equitable remedies—enforced by the courts of appeals—that are intended to restore the status quo; it cannot issue penalties for violations. 29 U.S.C. § 160(c); *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10 (1940). The Board does have authority, after issuance of a complaint by the General Counsel, to "petition any United States district court for appropriate temporary relief or restraining order" while the dispute is pending at the NLRB—a power akin to a court's power to enter an injunction preserving its own jurisdiction. 29 U.S.C. § 160(j); *Starbucks Corp. v. McKinney*, 602 U.S. 339, 342 (2024). But the relief is "temporary," and the Board lacks authority to enter or enforce such an order on its own. *See* 29 U.S.C. § 160(j).

The Board also has only highly circumscribed rulemaking power, authorizing it "to make, amend, and rescind, in the manner prescribed by [the Administrative Procedure Act], such rules and regulations as may be

necessary to carry out the provisions of [the NLRA]." 29 U.S.C. § 156. Almost all of the Board's rules "concern rules of practice before the Board and other procedural and housekeeping measures." Jeffrey S. Lubbers, *The Potential of Rulemaking by the NLRB*, 5 FIU L. Rev. 411, 413 n.19 (2010). The Board's rare efforts at substantive rulemaking have been rebuffed by the courts. *Chamber of Com.*, 721 F.3d at 155 (striking down a workplace notice rule as exceeding the Board's rulemaking authority); *Chamber of Com. of U.S. v. NLRB*, 723 F. Supp. 3d 498, 508 (E.D. Tex. 2024) (vacating the joint-employer rule).

2. The NLRB fits squarely into a long tradition of modest restrictions imposed by Congress and upheld by this Court.

The Constitution provides explicit procedures for the "Appointments" of "Officers of the United States." U.S. Const. art. II, § 2, cl. 2. But "[t]here is no express provision respecting removals." *Myers v. United States*, 272 U.S. 52, 109 (1926). The authority to remove executive-branch officials (at least by means other than impeachment) was not discussed at the Constitutional Convention. *See id.* at 109–10. And the Constitution likewise says nothing about the number and structure of executive-branch departments—leaving those details to Congress.

The founders understood, however, that Congress could impose limits on the President's discretion to remove certain officers. Hamilton assumed that the advice and consent of the Senate "would be necessary to displace as well as to appoint" officers. The Federalist No. 77, at 407. Although Madison disagreed that the Senate played such a direct role, he believed that an executive-branch official exercising adjudicative functions "should not hold

his office at the pleasure of the executive." 1 Annals of Cong. 481-82, 636 (1789) (Joseph Gales ed., 1834). And in *Marbury v. Madison*, Chief Justice Marshall, backed by a unanimous Court, adopted the same view, writing that not all executive officers need be "removable at the will of the executive." 5 U.S. (1 Cranch) 137, 162 (1803).

From the beginning, Congress imposed removal limits to protect the ability of some executive officials to fairly adjudicate matters coming before them. In establishing the territorial courts (a form of "legislative court[]" housed in the executive branch), the First Congress "fixed the terms of the office of the judges of those courts during 'good behavior'"—a provision that, this Court later held, Congress "was competent … to prescribe." *McAllister v. United States*, 141 U.S. 174, 186 (1891). Before the Civil War, Congress established the Court of Claims—another legislative court whose judges were likewise shielded from arbitrary removal. *See Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935). Congress granted similar removal protections to, for example, the Board of General Appraisers (the predecessor to the Court of International Trade) in 1890 and the Board of Tax Appeals in 1924.[4]

Reflecting this settled understanding, Congress has since the founding included removal protections in statutes creating a range of impartial, expert-driven agencies to insulate them from outside influence. Datla & Revesz, *Deconstructing Independent Agencies*, 98 Cornell L. Rev. at 770. For example, Congress in 1790 created the five-member Sinking Fund Commission "to

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[4] *See* Act of June 10, 1890, Pub. L. No. 51-407, ch. 407, § 12, 26 Stat. 131, 136–38 (1890) (Board of General Appraisers); Act of 1924, Pub. L. No. 68-176, ch. 234, § 900, 43 Stat. 253, 337 (1924) (Board of Tax Appeals).

perform economically critical executive and policy functions," providing that two of its members could not be removed by the President. *Harris v. Bessent*, 2025 WL 980278, at *37 (D.C. Cir. 2025) (Millett, J., dissenting). The following year, Congress gave the President "no removal authority" over members of the Bank of the United States. *Id.*

And in many cases, rather than eliminating the President's removal authority entirely, Congress provided that members of these bodies could be removed only for cause. Beginning nearly 150 years ago with the Interstate Commerce Commission, Congress restricted the President's ability to remove officers absent "inefficiency, neglect of duty, or malfeasance in office." Interstate Commerce Act, Pub. L. No. 49-41, ch. 104, § 11, 24 Stat. 379, 383 (1887). When Congress established the Federal Reserve Board in 1913, it provided that Board members may only be "removed for cause." Federal Reserve Act, Pub. L. No. 63-43, ch. 6, § 10, 38 Stat. 251, 260–61 (1913). Likewise, in creating the Federal Trade Commission in 1914, Congress specified that the agency's members could be removed only "for inefficiency, neglect of duty, or malfeasance in office." Federal Trade Commission Act, Pub. L. No. 63-203, ch. 311, § 1, 38 Stat. 717, 717–18 (1914). Over the following decades, Congress established numerous additional independent agencies with similar for-cause removal protections, including, among others, the Federal Radio Commission in 1927, the Federal Power Commission in 1930, and the Federal Communications Commission in 1934. *See* Datla & Revesz, *Deconstructing Independent Agencies*, 98 Cornell L. Rev. at 771 n.2.

For half a century, these removal protections operated to protect independent agencies without controversy. In 1935, this Court in *Humphrey's Executor* unanimously upheld the constitutionality of such protections. The Court made clear that Congress had the power to require the President to show "inefficiency, neglect of duty, or malfeasance in office" to remove FTC Commissioners. 295 U.S. at 619. Congress's authority to create multimember regulatory agencies like the FTC, the Court explained, "includes, as an appropriate incident, power to fix the period during which [its members] shall continue, and to forbid their removal except for cause in the meantime." *Id.* at 629.

In the ninety years since *Humphrey's Executor*, this Court has repeatedly reaffirmed it. In *Wiener*, the Court unanimously rejected a presidential claim to at-will removal authority over the War Claims Commission. 357 U.S. at 349. And in *Morrison v. Olson*, a nearly unanimous Court rejected a challenge to a removal restriction on an Independent Counsel. 487 U.S. 654 (1988). Congress has relied on that precedent to structure dozens of additional multimember agencies headed by officers protected from at-will removal, including the NLRB—which Congress established just over a month after *Humphrey's Executor* and modeled on the agency structure upheld there. *See* J. Warren Madden, *Origin and Early Years of the National Labor Relations Act*, 18 Hastings L.J. 571, 572 (1967).[5]

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[5] *See, e.g.*, 42 U.S.C. § 7412(r)(6)(B) (Chemical Safety and Hazard Investigation Board); 42 U.S.C. § 1975(e) (Commission on Civil Rights); 42 U.S.C. § 7171(b)(1) (Federal Energy Regulatory Commission); 5 U.S.C. § 7104(b) (Federal Labor Relations Authority); 46 U.S.C. § 46101(b)(5) (Federal Maritime Commission); 5 U.S.C. § 1202(d) (Merit Systems Protection Board); 30 U.S.C. § 823(b)(1) (Mine Safety and Heath Review Commission); 29 U.S.C.

A majority of the Court refused to "revisit" these precedents in *Seila Law*, 591 U.S. at 204 ("[W]e need not and do not revisit our prior decisions allowing certain limitations on the President's removal power."). Although the Court found the novel structure of the single-director CFPB unconstitutional, *id.* at 238, one solution on which seven Justices agreed would be to "convert[] the CFPB into a multimember agency," as in *Humphrey's Executor*. *Id.* at 237 (Roberts, C.J., joined by Alito and Kavanaugh, JJ.); *see also id.* at 298 (Kagan, J., joined by Ginsburg, Breyer, and Sotomayor, JJ., concurring in the judgment with respect to severability and dissenting in part).

B. *Wilcox v. Trump*

The Senate confirmed Ms. Wilcox as a member of the Board in September 2023 for a term (her second) of five years. *Wilcox*, 775 F. Supp. 3d at 222. In open disregard of the NLRA's for-cause removal provision, a letter sent by email to Ms. Wilcox on behalf of the President on January 27, 2025, informed her that she was "hereby removed from the office of Member[] of the National Labor Relations Board"—more than three years before her term was to expire—without identifying any neglect of duty or malfeasance by Ms. Wilcox and without providing her with notice or a hearing. *Id.* By reducing the NLRB to just two remaining members, the President's removal of Ms. Wilcox eliminated a quorum—paralyzing

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§ 153(a) (National Labor Relations Board); 45 U.S.C. § 154 (National Mediation Board); 49 U.S.C. § 1111(c) (National Transportation Safety Board); 42 U.S.C. § 5841(e) (Nuclear Regulatory Commission); 29 U.S.C. § 661(b) (Occupational Safety and Health Review Commission); 39 U.S.C. § 502(a) (Postal Regulatory Commission); 49 U.S.C. § 1301(b)(3) (Surface Transportation Board); 39 U.S.C. § 202(a)(1) (United States Postal Service Board of Governors).

the agency's operations. *See* 29 U.S.C. § 153(b) (providing that the Board requires at least three members for a quorum).

The district court found that Ms. Wilcox's removal was a "blatant violation" of the NLRA, 29 U.S.C. § 153(a). *Wilcox*, 775 F. Supp. 3d at 220. Indeed, the government has never attempted to argue otherwise. *See id.* Instead, the government tried to justify its admitted violation of the NLRA's unambiguous statutory terms by resorting to a novel and expansive interpretation of Article II. The district court found these "constitutional arguments to excuse this illegal act [to be] contrary to Supreme Court precedent and over a century of practice." *Id.* at 223. Accordingly, the court granted Ms. Wilcox's motion for summary judgment and awarded her both declaratory judgment and injunctive relief. *Id.* at 235.

The government appealed and sought an emergency stay pending appeal. A deeply divided special panel of the D.C. Circuit agreed and issued a stay over a dissent, setting out its reasoning in three fractured opinions. *See Harris*, 2025 WL 980278. The en banc D.C. Circuit vacated the panel's stay order, noting that this Court "has repeatedly stated that it was not overturning the precedent established in *Humphrey's Executor* and *Wiener* for multimember adjudicatory bodies." *Harris v. Bessent*, 2025 WL 1021435, at *1 (D.C. Cir. 2025).

The government then asked this Court to grant certiorari before judgment and reinstate the stay. The Court denied the government's motion but stayed the case "pending the disposition of the appeal" in the D.C. Circuit "and disposition of a petition for a writ of certiorari, if such a writ is timely sought." Slip Op. 2. The Court recognized that the President's removal power was "subject to

narrow exceptions recognized by our precedents," and declined to "ultimately decide in this posture whether the NLRB … falls within such a recognized exception." Slip Op. 1. Although the Court thought that "the Government is likely to show that … the NLRB … exercise[s] considerable executive power," it pointedly left the merits for "resolution after full briefing and argument." Slip Op. 1.

The appeal remains pending before a D.C. Circuit merits panel on a "highly expedited schedule." *Id.* at 3a. As of the date of this filing, the merits have been fully briefed and oral argument was held on May 16, 2025. This Court denied Ms. Wilcox's petition for certiorari requesting that the Court take up her case in conjunction with this one.

SUMMARY OF ARGUMENT

I. This Court should proceed with caution in resolving this case. Independent agencies differ widely in their structure and functions, and these differences are key to evaluating the constitutionality of the agencies' removal restrictions. While the Court has struck down removal limits on "novel" agencies with no basis in the nation's traditions, it has upheld such provisions as applied to a range of "traditional" independent agencies exercising primarily adjudicative functions. *Seila Law*, 591 U.S. at 207. And it recently reaffirmed that approach, holding that the constitutionality of removal protections applicable to the Federal Reserve turn on its "unique[] structure[]" and "distinct historical tradition." *Wilcox*, 145 S. Ct. at 1415.

The NLRB has several key features that distinguish it from other agencies. For example:

- Congress created a unique "separation of powers within the agency" by bifurcating the NLRB's adjudicatory and prosecutorial functions between the Board and the General Counsel. *United Food & Com. Workers*, 484 U.S. at 118 n.5.
- In "stark contrast to the proactive roles of other labor agencies," the Board lacks authority to initiate investigatory or enforcement actions on its own. *Chamber of Com.*, 721 F.3d at 156 & n.2.
- The Board "may be the only agency that needs a court's imprimatur to render its orders enforceable." *Dish Network*, 953 F.3d at 375 n.2.
- The Board cannot issue penalties, but is limited to ordering equitable remedies—enforced by the courts of appeals—to restore the status quo. *See Republic Steel*, 311 U.S. at 10.
- Congress gave the Board constrained rulemaking authority, allowing it to enact only "such rules and regulations as may be necessary to carry out the provisions of [the NLRA]." 29 U.S.C. § 156.

Each of these agency-specific features bears directly on the constitutionality of the NLRB's removal limits. This Court should be careful to avoid prematurely deciding that issue before it has a chance to evaluate the NLRB's structure and the authority of its Board members on the merits.

II. The NLRB's independence is essential to its ability to effectively resolve labor disputes. As this Court recognized in *Humphrey's Executor*, an adjudicator "who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will." 295 U.S. at 629. But an overbroad

resolution of this case might leave the President free to fire adjudicators based on dissatisfaction with their rulings—eliminating the impartiality on which the credibility of the agency's decisions depends. Such a decision by this Court would undermine the impartiality and credibility not only of the NLRB, but also of a wide range of primarily adjudicatory agencies and legislative courts like the Tax Court and the Court of Appeals for Veteran Claims. This Court should proceed cautiously to ensure that it does not inadvertently cause this untenable result.

ARGUMENT

This Court should affirm the decision below for the reasons set forth in the respondents' brief. If, however, the Court is inclined to strike down the FTC's removal limits, it should exercise caution in how it does so. To avoid disruption to a range of critical federal functions, the Court should avoid broad pronouncements before it has had the opportunity to consider the unique issues raised by the NLRB's bifurcated structure, and the authority of Board members within that structure, that are currently pending in the court of appeals. Otherwise, the Court risks overlooking key agency-specific features and painting with too broad of a brush.

I. This Court should tread carefully in resolving the constitutionality of the FTC's removal limits.

The constitutionality of an independent agency's for-cause removal protections turns on the history, structure, and authority of the agency at issue. Independent agencies differ in key ways—including in their removal protections, number of members, and authority to litigate or adjudicate disputes. *See* Datla & Revesz, *Deconstructing Independent Agencies*, 98 Cornell L. Rev.

at 769. Indeed, "there is no single feature, structural or functional, that every agency thought of as independent shares." *Id.*

This Court has relied on these agency-specific features in striking down removal limits on "novel" agencies with "no basis in history and no place in our constitutional structure." *Seila Law*, 591 U.S. at 220; *see also Collins v. Yellen*, 594 U.S. 220, 220, 253 (2021) (Federal Housing Finance Agency); *see also Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 496 (2010) (relying on the Public Company Accounting Oversight Board's "novel structure" in declaring its removal protections unconstitutional). In contrast, the Court has upheld for-cause removal limits on a range of "traditional" "multimember board[s] or commission[s]," *Seila Law*, 591 U.S. at 207, that exercise "predominantly quasi judicial and quasi legislative" functions, *Humphrey's Executor*, 295 U.S. at 624. And the Court recently reaffirmed that approach in Ms. Wilcox's case, noting that "the constitutionality of for-cause removal protections" for the Federal Reserve Board turns on its "unique[] structure[]" and "distinct historical tradition." *Wilcox*, 145 S. Ct. at 1415.

Unlike other agencies, Congress has taken specific steps with the NLRB to resolve separation-of-powers concerns. Although the NLRA as originally enacted gave the Board "plenary authority over all aspects of unfair labor practice disputes," Congress changed that with the Taft-Hartley Act, creating a unique internal "separation of powers within the agency." *United Food & Com. Workers*, 484 U.S. at 117, 118 n.5. Today, the NLRB's adjudicatory and prosecutorial functions are divided between the Board, whose five members act like a panel

of appellate judges, and a General Counsel, who is "independent of the Board's supervision and review" and removable by the President at will. *Id.* at 118.

Also, unlike other agencies, the NLRB lacks authority to initiate investigatory or enforcement actions on its own. *See Chamber of Com.*, 721 F.3d at 156. "Because of the reactive nature of the Board's functions," it has "no roving investigatory powers." *Id.* And the NLRB also "may be the only agency that needs a court's imprimatur to render its orders enforceable"; the Board must seek enforcement in a federal court of appeals. *Dish Network*, 953 F.3d at 375 n.2 (Oldham, J.); *see* 29 U.S.C. §§ 154, 160(e). This "reactive mandate stands in stark contrast to the proactive roles of other labor agencies." *Chamber of Com.*, 721 F.3d at 156 n.2.

Moreover, Congress gave the agency highly constrained rulemaking authority, allowing it to enact only "such rules and regulations as may be necessary to carry out the provisions of [the NLRA]." 29 U.S.C. § 156. As the district court observed, the NLRB "hardly engages in rulemaking" beyond establishing procedures for bringing and adjudicating cases. JA154-55. The few advisory rules that the Board has issued interpreting the NLRA are not binding and are subject to de novo judicial review because the "interpretation of the meaning of statutes, as applied to justiciable controversies," is "exclusively a judicial function." *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 387 (2024).[6]

[6] Other than a rule on health care bargaining units and the joint-employer rule, a subject on which the courts have suggested that the NLRB is due no deference, *see Browning-Ferris Indus. of Cal., Inc. v. NLRB*, 911 F.3d 1195 (D.C. Cir. 2018), "the Board's CFR chapter only contains three other substantive rules," covering "jurisdictional

To fully evaluate the constitutionality of the NLRB's removal restrictions, this Court thus must consider the effect of these and other statutory features of the agency. Accounting for these agency-specific nuances is critical, not only for the agency at issue in this case, but also for lower courts considering the application of any rule this Court articulates to the diverse range of statutory provisions intended to guarantee agency independence. *See Seila Law*, 591 U.S. at 219 n.4 (relying on the Court's description of the 1935 FTC). It also allows the Court to shed light on what steps Congress can take to preserve independent agencies in the face of separation of powers concerns.

This Court did not grant certiorari in this case to resolve those issues. On the contrary, the Court denied certiorari in *Wilcox*. The Court should thus proceed with caution in resolving this case to avoid writing a rule that determines the constitutionality of removal restrictions not before the Court.

II. Congress regarded limits on the removal of NLRB members as essential to the agency's ability to effectively resolve labor strife.

Congress has authority, "in creating quasi legislative or quasi judicial agencies, to require them to act in discharge of their duties independently of executive control." *Humphrey's Executor*, 295 U.S. at 629. That rule

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standards for colleges and universities, and two relatively insignificant workplaces—symphony orchestras, and horse/dog racing." Lubbers, *The Potential of Rulemaking by the NLRB*, 5 FIU L. Rev. at 413; *see* 29 C.F.R. §§ 103.1, 103.2, 103.3. Even those rules are aimed at the Board's adjudicatory functions, by determining whether it will adjudicate labor disputes at certain workplaces or how it will evaluate certain evidence.

is necessary for primarily adjudicative agencies, this Court has recognized, because "it is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will." *Id.*

The NLRB is one such "independent quasi-judicial body." Roosevelt, *Statement on Signing the National Labor Relations Act*. Congress created the agency in the early twentieth century in response to escalating riots and other violence between employers and employees. Ordman, *Fifty Years of the NLRA: An Overview*, 88 W. Va. L. Rev. at 15–16. Congress understood that the NLRB's independence was essential to allowing the agency to resolve these disputes by maintaining its credibility with both sides. As Senator Wagner, the NLRA's sponsor, explained, labor disputes should be resolved by an independent tribunal "detached from any particular administration that happens to be in power." NLRB, 1 *Legislative History of the National Labor Relations Act*, at 1428. Reflecting that congressional judgment, "the Board was designed to be an independent panel of experts that could impartially adjudicate disputes." *Wilcox*, 775 F. Supp. 3d at 221; *see* 29 U.S.C. § 153(a).

If this Court were to decide this case broadly, in a way that invalidates removal protections applicable to the NLRB and other adjudicative agencies, the President would be free to fire adjudicators for ruling against political allies or for siding with adversaries—eliminating the impartiality on which the credibility of the agency's decisions depends.

Such a ruling would also undermine the legitimacy of a wide range of primarily adjudicatory agencies and

legislative courts—including the Tax Court, the Court of Appeals for Veteran Claims, the Court of Appeals for the Armed Forces, and the Court of Federal Claims—that make essentially "judicial determination[s]" by applying the law to the facts of each case that the parties bring before them. *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929). However this Court resolves the question in this case, it should ensure that it preserves these tribunals—at least until it has had full briefing and argument on the unique issues posed by such agencies.

* * *

This Court should not rush to invalidate the numerous independent agencies that Congress has established in reliance on the Court's precedent. No deadline or other urgency requires this Court to short-circuit the lower courts' review of the removal protections applicable to independent agencies not presently before the Court. The status quo of traditional multimember agencies has existed since the founding, and this Court's approval of such restrictions has stood since 1935. Given the tremendous national disruption that the government's position would risk, the Court should tread carefully, evolving this area of law (if at all) not with sweeping pronouncements, but through modest, case-by-case decisionmaking.

That is especially true given that many of these issues are already pending in the court of appeals. The question of the constitutionality of the NLRB's removal limits, in particular, was fully briefed and argued before the D.C. Circuit months ago. The absence thus far of a decision suggests that the D.C. Circuit is holding that case pending this Court's resolution of this one. Rather than reaching out to prematurely decide an issue not presented here, the

Court should let that process play out—giving the court of appeals the opportunity to apply whatever rule the Court adopts in this case to the unique features of the NLRB.

There is no reason not to await the lower court's considered judgment on the issue before taking it up in this Court. Indeed, in denying the government's request for certiorari before judgment in Ms. Wilcox's case, the Court has already held that "that question is better left for resolution after full briefing and argument." *Trump v. Wilcox*, 145 S. Ct. at 1415. Nothing has changed to alter that conclusion since then. And no real-world harm will come from allowing the ordinary appellate process to unfold and deciding the constitutionality of removal protections on a case-by-case basis—not in a single fell swoop.

CONCLUSION

The decision below should be affirmed. Whatever the Court decides, however, it should take care not to prematurely invalidate removal limits applicable to the NLRB and other independent agencies whose structure and function the Court has not yet evaluated.

Respectfully submitted,

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